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MSIG INSURANCE MALAYSIA BHD

v.

OVERSEAS ASSURANCE CORPORATION

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HIGH COURT MALAYA, KUALA LUMPUR
ANANTHAM KASINATHER J
[SUIT NO: D-22-NCC-36-2009]
10 DECEMBER 2010

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INSURANCE: *Double insurance - Liability of insurers to contribute - Houses in project covered by both fire policy and contractors' all-risk (CAR) policy - Cracks developed in houses - Whether damage caused by subsidence or settlement - Whether same peril covered by both policies - Fire policy insurer paid full claim of insured - Whether insurer entitled to contribution from CAR policy insurer - Whether payment made voluntary and ex gratia*

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The developer ('the insured') of a residential/commercial township obtained insurance coverage from both the plaintiff and defendant insurers for 165 units of 2-storey terraced houses ('the houses') in the project. The plaintiff issued a fire policy that included damage caused to the houses by, *inter alia*, subsidence and landslip. The defendant issued a Contractors All Risk Policy. During the currency period of both policies, cracks appeared in one phase of the houses. The plaintiff appointed loss adjusters, who in turn appointed consultant engineers ('JPK'), to investigate the cause of the damage. Based on the consultant engineers' report, the loss adjusters recommended settlement of the insured's claim. The plaintiff fully paid the insured's claim of RM1,011,838.31 and sought to recover RM522,838.31 from the defendant by way of contribution. The plaintiff submitted since the loss suffered by the insured was covered by both the plaintiff's and the defendant's policies, both parties were equally liable to compensate the insured. The defendant refused to contribute causing the plaintiff to file the instant action to recover the sum. The defendant's case, *inter alia*, was that the damage to the houses was due to defective design or inadequate construction of foundation and that was not a peril covered in the plaintiff's policy obliging it to pay. Hence, whatever payment the plaintiff had made was *ex gratia*. The defendant also took the view that liability was only attached if the damage was due to subsidence, which was an unpredictable event, and not to settlement, which was predictable. The plaintiff took the view that liability attached whether the cracks were caused by subsidence or settlement.

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Held (ordering the defendant to pay the plaintiff RM522,233.54 in contribution and RM35,000 as costs):

(1) There was no merit to the defendant's submission that the plaintiff was absolved of liability to pay because the damage was 'design-related'. This phrase was used in JPK's report in the context of earth works and dynamic compaction only and not in the context meant by the defendant. (para 29)

(2) The plaintiff's claim for contribution arose upon it having discharged its liability to its insured whereupon it was entitled to call upon the defendant to bear its share of the loss and pay its proportion of the amount already paid under the plaintiff's policy. (para 30)

(3) Policy liability was not based on whether the loss was the result of 'subsidence' or 'settlement', since these two terms were often used interchangeably, but whether the cracks were caused by 'causes unconnected with loading from a building'. (para 25)

(4) It was apparent from JPK's report that the cracks were not the natural consequence of the loading of the buildings and/or the foundation and therefore were not caused by predictable circumstances. (para 27)

Case(s) referred to:
David Allen & Sons (Billposting) Ltd v. Drysdale [1993] KBD 113 ***(refd)***
Legal And General Assurance Society Ltd v. Drake Insurance Co Ltd [1992] 2 Lloyds Law Report ***(refd)***
Ong Koh Hou v. Perbadanan Pembangunan Bandar & Anor [2009] 1 LNS 512 HC ***(refd)***

Other source(s) referred to:
MacGilllivray On Insurance Law, 3rd edn, p 673
Poh Chu Chai, *Law of Insurance*, 3rd edn, Longmans Publication, p 791

For the plaintiff - Kavitha Narayanan; M/s Anad & Noraini
For the defendant - Tunku Farik Ismail (Tan Sixin with him); M/s Azim, Tunku Farik & Wong

Reported by Ashok Kumar

JUDGMENT

Anantham Kasinather J:

Background Facts

[1] The plaintiff issued a fire policy to Perdana Park City Sdn Bhd ('the insured') in respect of 165 units of two storey terrace houses at Phase 1B Parkhomes ('the property') in a commercial/residential

development known as Perdana Park City in the Mukim of Batu, Kuala Lumpur in favour of the insured. This policy included an Endorsement bearing number 00002 for the period of cover from 22 April 2005 to 21 April 2006 for damage caused to the property by *inter alia* "subsidence and landslip". Coverage for loss due to subsidence was already included under the main policy but available only upon payment of an additional premium. Hence, the issuance of the endorsement upon payment of the additional premium.

[2] The defendant issued a contractors all risk policy to the insured ('CAR Policy') in respect of the property, as well, as, 20-22 storey apartments for the period 12 May 2003 to 26 March 2005. This policy included coverage for the period of maintenance from 29 March 2005 to 28 September 2006. The defendant's master policy is valid from 31 May 2002 to 30 May 2007 (exh. 54 Bundle "B").

History Of Claim

[3] The insured was involved in the development of a residential/commercial township generally known as Desa Parkcity in Mukim Batu, Kuala Lumpur. After the completion of the construction of the various units of buildings in the township, cracks appeared in the two storey terrace houses at Phase 1 B known as Nadia Parkhomes ('the said damage') and was discovered on 11 January 2006.

[4] The plaintiff after having been notified of the said damage by the insured proceeded to appoint Mesrrs Maphilindo International Sdn Bhd ('loss adjuster's') to investigate, assess the loss and determine liability, if, any, under the policy. The loss adjuster's proceeded to investigate and produced several reports during the investigation on the cause of the damage/loss. The final report dated 25 September 2007 (exh. 110-129, bundle "B") contains their conclusions on the causes for the damage to the buildings. In the course of the investigation, the loss adjuster's with the consent of the plaintiff appointed Jurutera Perunding Kemajuan Sdn Bhd (JPK) to investigate into the causes. The need to appoint JPK was probably the result of the findings of the project consultants being inconclusive. The project consultants for geotechnical works, Mesrrs PCGeo Management Sdn Bhd expressed the view that the cause of the cracks was due to soil movement arising from lateral and vertical migration of fine soil particles through the fills by action of ground water and the resultant differential settlement between footings.

[5] The loss adjuster's final report based on the conclusions in JPK's report (exh. 71-102 B) recommended settlement of the insured claim. Accordingly, the plaintiff proceeded to indemnify its insured for the sum of RM1,011,838.31 (exh. 167-168, bundle "B"). This report also determined that there was policy liability under the CAR policy based

on the cover for insured works taken over or put into service clause (exh. 59 of B). Accordingly, the report included a recommendation for the plaintiff to recover from the defendant by way of contribution. The plaintiff led evidence through its broker one Miss Julie Ooi Seok Cheng ('PW5') that the defendant was first notified of this loss on 20 February 2006. The plaintiff's solicitor duly sought such contribution through its solicitor's letter of 2 March 2009 (exh. 166, bundle "B"). The defendant having refused to contribute the plaintiff proceeded to file this claim to seek contribution from the defendant in respect of the amount of RM522,838.31.

Plaintiff's Case

[6] The plaintiff's case is that since the loss suffered by the insured was a peril insured under two policies, the obligation to compensate the insured for the loss falls equally upon the two insurers ie, the plaintiff and the defendant. According to the plaintiff, upon the plaintiff indemnifying the insured for its total loss, the plaintiff is entitled under the doctrine of contribution in insurance law to recover half of the payment made to the insured, from the defendant. The doctrine of the contribution in our law is best expounded in the passage at p. 719 of the book *"Law of Insurance"* by Poh Chu Chai, 3rd edn, which states as follows:

> When a particular risk is insured with two or more insurers and a loss arising from the risk insured is fully paid for by one of the insurers, the insurer who has indemnified the insured for the loss is entitled to claim a contribution from the other insurers who have not indemnified the insured. An insurer's right of contribution does not arise from contract but in equity, namely that persons who are liable for the same loss should contribute equally towards the loss.

However, the plaintiff concedes that the right to contribution is subject to the plaintiff fulfilling six conditions. These conditions are:

(a) All policies concerned must comprise the same subject matter;

(b) All policies must be effected by or on behalf of the same assured;

(c) All policies must be in force at the time of loss;

(d) All policies must be legal contracts of insurance;

(e) No policy must contain any stipulation by which it is excluded from contribution; and

(f) All policies must be effected against the same peril.

A The plaintiff contended that all six conditions have been fulfilled thereby entitling it to succeeded in this claim.

The Defendant's Case

[7] The defendant does not dispute the doctrine of contribution. The B thrust of the defence is three fold. First, that the burden of proof vests on the plaintiff. The burden of proving another subsisting contract of insurance on the same property and on the same interest lies upon the insurer who asserts that there is double insurance. (See *MacGillivray On Insurance Law* at p. 673 - 3rd edn). Counsel for the defendant C contended that the plaintiff has failed to discharge this burden. Secondly, that the insured's claim did not fall within the peril stipulated in the plaintiff's policy and to that extent, the claim was settled *ex gratia*. Thirdly, even if the claim is within the peril stipulated in the plaintiff's policy, it is excluded by either cl. 2 of the endorsement (exh. 52 of B) D or cl. (c) of the clause appearing under the caption "subsidence and landslip" in the plaintiff's policy.

The Six Conditions

[8] I propose, in this judgment, to examine whether the plaintiff has E fulfilled the six conditions against the background facts and the law applicable to each of the conditions, to ascertain the merits behind the plaintiff's claim to have fulfilled all of the six conditions.

All Policies Concerned Must Comprise The Same Subject Matter

F **[9]** Counsel for the plaintiff submitted that both the plaintiff's and defendant's policies cover the same subject matter being 165 Units of Parkhomes (see exh. 52 of bundle "B" for the subject matter of plaintiff's policy and exh. 54 of bundle "B" for the subject matter of the defendant's policy). Counsel for the defendant does not dispute that G the defendant's policy provides coverage for the property. However, he submitted that over and above the property, the defendant's policy also covered other property in the form of 20-22 storey apartments. I understand the submission of counsel for the defendant to imply that this condition is only fulfilled when the subject matter of the two policies are H identical. With respect, I disagree. In my judgment, so long as the item forming the subject matter of the claim is insured under two sets of insurance policies, then, the subject matter is deemed to be the same even if one of two policies provides coverage for additional properties. Accordingly, I hold the plaintiff to have satisfied the first condition.

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All Policies Must Be Effected By Or On Behalf Of The Same Assured

[10] The plaintiff's policy was issued in favour of the insured (exh. 42 of bundle "B"). The defendant's policy was also issued in favour of the insured (exh. 54 of bundle "B"). The submission of counsel for the defendant that the insured were different is based in the capacity of the insured. Counsel submitted that the interest covered under the plaintiff's fire policy are "Perdana Parkcity Sdn Bhd and/or its nominee as property managers and/or individual owners and/or financiers and/or mortgagees f.t.r.r & i". The interest covered under the defendant's CAR Policy are "Perdana Parkcity Sdn Bhd as principal/developer and /or the lenders, their main contractors, their nominated sub-contractors of any tiers f.t.r.r & i". The submission of counsel for the defendant was that there are numerous other parties insured under the plaintiff's fire policy and the defendant's CAR Policy. The only common insured is Perdana Parkcity Sdn Bhd, but under the plaintiff's fire policy, it is insured as the property manager and under the defendant's CAR Policy, it is insured as the principal/developer. Against these background facts, counsel submitted that the interest of the common insured ie, Perdana Parkcity Sdn Bhd was different under each policy as the capacity in which it was insured differ. For example, counsel contended that under the plaintiff's fire policy, as property manager, it would be in charge of managing the completed properties.

[11] With respect, I find no merit in this submission. As in the case of the subject matter, in my judgment, this condition is fulfilled so long as the identity and capacity in which the insured is similar for the purposes of the claim. In my opinion, it is apparent from a reading of the two policies that Perdana Parkcity is insured as principal in both policies. The fact that the insured is covered when performing the same or different jobs in respect of the same subject matter in different capacities does not detract from the fact, that, in respect of the claim, the insured is covered under the plaintiff's and defendant's policies in the same capacity ie, as principal. With respect, I do not find the decision of the court in *Ong Koh Hou v. Perbadanan Pembangunan Bandar & Anor* [2009] 1 LNS 512 to be of any of assistance as it deals with an entirely different issue.

All Policies Must Be In Force At The Time Of Loss

[12] Counsel for the plaintiff submitted that since the plaintiff's policy was valid from 22 April 2005 to 21 April 2006 (exh. 52 of bundle "B") and the defendant's master policy valid from 31 May 2002 to 30 May 2007 (exh. 54 of bundle "B"), both policies were in force at the time of the loss. Counsel for the plaintiff also relied on the evidence of DW1 to the following effect:

A Q: Do you agree with me that if the loss occurred on 11 January 2006, then it falls within the ambit of both policies?

A: If you are not talking about declaration four, then it falls under master policy ... covering 31 May 2002 to 30 May 2007.

B Q: Do you agree that it is covered by plaintiff's policy?

A: Yes, it is covered by plaintiff's policy.

[13] In support of her submission. In my judgment, since the claim under the defendant's policy is being pursued under the endorsement C M116 of the main policy and the cover period extends from 31 May 2002 to 30 May 2007, it is clear that at the date of damage ie, 11 January 2006, both policies were in force.

All Policies Must Be Legal Contracts Of Insurance

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[14] The plaintiff submits that there is absolutely no doubt and it is an undisputed fact that both policies are legal contracts of insurance. Hence this requirement is fulfilled.

No Policy Must Contain Any Stipulation By Which It Is Excluded From E *Contribution*

[15] My examination of the two policies did not reveal any provision in either the plaintiff's fire policy or the defendant's car policies excluding the right to contribution.

F *All Policies Must Be Effected Against The Same Peril*

[16] The plaintiff's policy is essentially a fire policy with an extension for subsidence and landslip. Apparently, 'subsidence' as an extension in fire "policies is a recent development according to the author of the book G Claims and Standard Fire Policies, Special Extensions and Special Perils" by RM Walmsley. This extension, according to the author, is intended to provide cover to the insured for a wide range of damage caused by *inter alia* 'settlement, collapse of the site, etc'. Since considerable time was expended by both counsel in the cross-examination of the respective witnesses on matters relating to this clause pursuant to which the H insured was indemnified under the plaintiff's policy, I propose to set out in detail the relevant clause. This clause reads:

Settlement And Landslip

I **[17]** "In consideration of the payment by the insured to the company of an additional premium, it is hereby agreed and declared that the insurance under this policy shall extend to cover loss or damage to the property insured caused by subsidence and/to heave of the site on which

the buildings stand or land belonging thereto, or landslip excluding loss or damage occasioned by happening through or in consequence of coastal or river erosion, demolition, structural alteration or structural repair or **defective design or inadequate** (emphasis added) construction of foundation." Much reliance was placed by counsel of the defendant on the italic size word. Counsel contended that the insurance claimed ought to have been rejected as it was the result of defective design. I propose to deal with this submission later in this judgment.

[18] The damage in this case to the property are the cracks that appeared on the walls of several units of Nadia Parkhomes which was discovered on 11 January 2006. The payment of the claim made by the insured for this loss was primarily based on the final report of the loss adjuster. For this reason, I propose to examine their final report and the conclusions therein for the purposes of this judgment. Since the conclusions in para. 8 of JPK's report were the subject matter of much cross examination by both counsel, I propose to set out in detail this paragraph. Paragraph 8 reads as follows:

> 8.1 In view of the above JPK are therefore of the opinion that the reported cracking to the housing units was due to continuing consolidation differential settlement of footings consequent of continuing consolidation of the pre-existing variable dumped fill that was placed at various times during past quarrying operation with little or no compaction initially over virgin/undisturbed residual granitic soils. This continuing and differential consolidation had come about following placing of the compacted fill of highly non-uniform thickness (surcharging) over the pre-existing variable dumped fill also of varying thickness.
>
> 8.2 JPK are also of the opinion that a substantial portion of the settlement was probably also triggered and accelerated by internal soils erosion and/or collapse settlement in the loose pre-existing soils.
>
> 8.3 The DC treatment adopted was inappropriate to treat the thick poor pre-existing ground; more so with DC through substantial compacted upper layer. As a consequence, the poor pre-existing ground below the foundations remained unimproved and prone to internal erosion and collapse settlement.
>
> 8.4 These shortcomings are obviously design related issues. Both PCG and TYL had erred in the process as elaborated earlier.

[19] The plaintiff's case essentially is that policy liability attaches under its policy irrespective of whether the cracks to the building were caused by subsidence or settlement. Counsel for the plaintiff submitted that, in

fact, settlement is part of subsidence and that the English authorities accept that, in law, subsidence would involve some measure of settlement. Counsel referred the court to the case *David Allen & Sons (Billposting) Ltd v. Drysdale* [1993] KBD 113 and to the literature in RM Walmsley's book "*Claims and Standard Fire Policies, Special Extensions and Special Perils*." The author of this book states that 'subsidence' is related to a wide range of wordings with varying references to 'settlements'.

[20] Counsel for the defendant takes the position that there is a distinction in insurance law between subsidence and settlement and liability only attached, according to him, if the cracks were caused due to 'subsidence'. Counsel submitted that the reference to the word 'settlement' on more than one occasion in paras 8.1 to 8.4 clearly demonstrated, according to him, that according to the plaintiff's own expert, the damage, in this case, was caused by 'settlement' and not 'subsidence'. Towards this end, counsel for the defendant cross-examined the loss adjusters extensively on the conclusions set out in paras. 8.1 to 8.4. Part of the cross-examination of the loss adjuster ie, PW4, took the following form:

Q: Look at p. 78, bundle B, conclusion by JPK, can you confirm in para. 8.1 to 8.3, only "settlement" is stated in the report as the cause of failure?

A: The word used is "settlement" but it is also in relation to "subsidence".

Q: Refer to p. 16, definition by DR GH Edward, do you agree with the definition?

A: This is the definition by the author, there could be other definitions. Must look at it in relation to the case.

Q: I put it to you that JPK's report did not mention "subsidence" as a cause of failure thus the claim is not payable by the plaintiff?

A: I disagree.

Q: Do you agree that failure to distinguish between "subsidence" and "settlement" is a fundamental error?

A: I disagree.

[21] Strangely, counsel for the defendant did not question the author of the report ie, PW3, to the same extent as regards his conclusions in paras. 8.1 to 8.4. In any event, in counsel's limited cross-examination of PW3 on his conclusions, PW3 confirmed that the cracks were the result of "subsidence".

Q: Refer to p. 8 of your report, please explain para. 8.1. A

A: The cracks were due to continuing time dependent differential settlement of footings consequent of continuing consolidation of the pre-existing dumped fill.

Q: Are the cracks therefore the result of subsidence? B

A: Yes.

[22] In my judgment, counsel for the defendant expended unnecessary time and energy in seeking to establish a distinction between the words 'subsidence' and 'settlement' for purposes of policy liability under the C 'subsidence and landslip' clause. With respect, I agree with counsel for the plaintiff that 'settlement' may be a part of 'subsidence' and *David Allen*'s case is authority for the proposition that 'subsidence' would involve some measure of 'settlement' (See *David Allen & Sons (Billposting) Ltd v. Drysdale* [1939] KBD 113. In other words, I do not D for one moment dispute that there is a difference between 'subsidence' and 'settlement' but, in my judgment, both 'subsidence' and 'settlement' may be covered under the plaintiff's policy depending on the causes for the cracks to the property.

[23] In my judgment, the true test to determine whether the loss, E suffered by the insured on the facts of this case is covered by the "subsidence and landslip clause" is best expounded in several passages in the Book by Dr GH Edwards *"Subsidence, Landslip and Ground Heave"*. These passages are highlighted by counsel for the defendant in his submission. F

Subsidence

The downward movement of a site on which buildings stand, from causes unconnected with loading from a building. Examples are underground mining, clay shrinkage (especially due to the action of the G tree roots) and erosion due to water passing through the sub-soil, but excluding the compaction made-up ground or infill.

Settlement

The Downward movement of the site due to the application of H superimposed loading from a building; it is the wholly natural effect of superimposing a load on a site and is predictable.

Subsidence/Settlement

[24] "Damage arising from subsidence of the site is frequently not I distinguished from damage caused by settlement. In providing the insurance cover, insurers are seeking to cover damage caused by fortuities which may arise during the period covered by the policy.

Subsidence of the site is a fortuity, whereas settlement is not and is predictable. Simple engineering tests will establish whether the load-bearing capacity of the sub-oil beneath foundations is capable of supporting the imposed load and if not, then settlement is inevitable and is not a fortuity. It is sometimes argued that the house owner is not able to distinguish between subsidence and settlement of the site but this is not a satisfactory reason for insurers being asked to pay for what is inevitable and not fortuitous damage."

[25] Based on these passages in the authoritative text of Dr GH Edwards, policy liability, in my opinion, is not based on whether the loss was the result of 'subsidence' or 'settlement' since these two terms are often used interchangeably but whether the cracks were caused by "causes unconnected with loading from a building". I opine to this effect because Dr Edwards also defines 'settlement' in the context of soil movement "due to the application of superimposed loading from a building". In other words, the only difference between subsidence and settlement is that settlement is not fortuitous but "the wholly natural effect of superimposing a load on a site and is predictable" whereas subsidence is fortuitous since it arises from causes unconnected with loading from a building.

[26] The plaintiff had wisely engaged the services of JPK an independent consultant to conduct the relevant engineering test to ascertain the causes for the cracks. Their test has revealed the cracks to be the result of;

(a) continuing time dependant differential 'settlement' of footings as a consequence of continuing consolidation of the pre-existing dumped fill;

(b) 'a substantial portion of the settlement' was probably triggered and accelerated by internal soil erosion and/or collapse 'settlement' in the loose pre-existing soil; and

(c) the treatment applied to treat the thick poor pre-existing ground was inappropriate.

[27] To the extent that JPK are independent consultants, naturally, the court should have regard to the conclusions in their report. It is apparent from their report and the oral evidence of PW3 that the cracks are not the natural consequence of the loading of the buildings and / or the foundation. On the contrary, the conclusions in JPK's report leave me, in no doubt, that the cracks were caused not by predictable circumstances accompanying the loading of the building and the foundations to the building but due to the state of the pre-existing soil, the poor treatment of the same and which factors were compounded by

the inappropriate treatment of the thick poor pre-existing ground coupled with the application of the dynamic compaction of the upper layer. This dynamic compaction of the upper layer causing the poor pre-existing ground below the foundation to remain unimproved and to use the words of PW3 in his report "prone to internal erosion and collapse settlement". In para. 8.1 of the JPK report, PW3 concluded that the cause was the "continuing consolidation of the pre-existing variable ... granitic soil. This continuing and differential consolidation had come about following placing of the compacted fill of highly non uniform thickness (surcharging) over the pre-existing variable dumped fill also of varying thickness. In other words, it is unrelated to compaction of made up ground or infills, which is excluded by Dr Edwards in his definition of subsidence because settlement of compacted ground or infill is to be expected as part of the settlement process. In any event, in my opinion, the cause cannot be said to be predictable when the expert is clearly of the opinion that the dynamic compaction method adopted was inappropriate.

[28] This, however, is not the end of the matter. Counsel for the defendant submitted that even if the insured's loss falls within the peril insured under the plaintiff's policy, liability is excluded since the extended coverage is only applicable to the guard house, swimming pool, etc (see cl. 2 of exh. 52 of B). With respect, I find no merit in this submission as the reference to the swimming pool in cl. 2 excludes liability for damage to the property listed under item (a) of the 'subsidence and landslip' clause and not to the building, forming the subject matter of the insured claim. Counsel for the defendant also contended that, in any event, liability under the policy is excluded because one of the conclusions in JPK's report is that the cracks were caused by design related issues. Counsel referred to para. 8.4 of the JPK's report wherein one of the conclusions is that; "these shortcomings are obviously design related issues." Counsel invited the court to read this conclusion in the context of cl. (c) of "the Subsidence and Landslip Clause" which absolved the plaintiff of liability for loss or damage occasioned by "defective design or inadequate construction or foundation".

[29] With respect, I find no merit in this submission. It is evident from an examination of the JPK's report that PW3 used the word 'design' in para. 8.4 to refer to the construction drawings with schematic prepared by Merssr PCGeo Management Sdn Bhd (PCG) in connection with their dynamic compaction design as reproduced in figure 5 (exhs. 74 & 83 of B). The author of the report who appeared as PW3 further clarified this to be the case in the course of cross examination when he explained that he used this word in the context of earth works and

dynamic compaction only. PW3 also explained that foundation in engineering involved matters such as footing and grounds supporting the building. An examination of paras. 5 & 6 of the JPK's report (exh. 74-77 of B) demonstrates why proper design drawings are necessary before dynamic compaction is undertaken and the consequences of poor implementation of dynamic compaction of pre-existing soil.

[30] Another defence raised by the defendant is that this court ought to dismiss the plaintiff's claim because under the CAR Policy, loss ought to be notified within 30 days from the date of loss/discovery. Counsel for the defendant contended that the loss on the facts of this case was discovered on 11 January 2006 but only notified on 20 February 2006. The plaintiff's answer to this issue is quite simply that the loss notification clause is only relevant when the claim is pursued by the insured against the defendant. The position, in this case, is very different because this is a case of a co-insurer seeking contribution. I agree entirely with the pronouncements in the case of *Legal and General Assurance Society Ltd v. Drake Insurance Co Ltd* [1992] 2 Lloyds Law Report that no commercial purpose is served by the insured giving notice to the defendant since he does not intend to claim against the defendant. The plaintiff's claim for contribution arises only upon the plaintiff having discharged its liability to its own insured whereupon it is entitled to call upon the defendant to bear its share of the loss and pay their proportion of the amount already paid under the plaintiff's policy (See *Law Of Insurance* by Poh Chu Chai 3rd edn (Longmans Publication] at p. 791).

[31] Since the amount paid by the plaintiff to the insured of RM1,011,838.31 was not challenged, I order the defendant to pay the plaintiff the sum of RM 522,233.54 as its contribution for the amount paid by the plaintiff to the insured. I order the defendant to pay costs of RM35,000 *in lieu* of taxation.